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Self-defense and freedom of the seas.

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SELF-DEFENSE AND FREEDOM OF THE SEAS

by
Lieutenant Thomas E. Donahue, Jr., U.S. Navy

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

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SCOPE

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Introduction

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> ...all peoples can benefit most from a public order of the oceans which secures for all the highest possible degree of shared access to ocean resources and of shared competence over ocean activities and...that a public order adequate to such ends can only be established and maintained by people's effective recognition and understanding of their common interests, with continuous reassessment in the context of the development and change characteristic of the contemporary world.[2]

It can be appreciated that the communal use of the sea might

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Chapter I

Introduction

> "No State is authorized to interfere
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be the most effective way in which it can be used for the benefit of all and further, that communal use must be governed by an order to promote effective use and prevent abuse. This order would hopefully define the rights of the users of the sea and those affected by such use and further, provide machinery for the settlement of disputes. Generally, this order or international law, would attempt to obviate the need for unilateral forceful settlement of claims.

The principle of self-defense interplays with that of freedom of the seas in at least three ways: first, a particular use of the sea may include in its justification the right of self-defense; secondly, the protection of previously justified use of the sea against interference; and, finally, the use of the sea to prevent interference with a right in no way connected with the sea.

It is the aim of this paper to examine the relationship between self-defense and freedom of the sea prior to and subsequent to the second world war and to attempt to determine whether these principles have undergone changes and, if so, how those changes affect contemporary interaction between the principles.

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It is the aim of this paper to examine the relationship between self-defense and freedom of the sea prior to and subsequent to the second world war and to attempt to determine whether these principles have undergone changes and, if so, how those changes affect contemporary interaction between the principles.

The format of the examination will include a separate consideration of the principles with a brief history of each followed by their application to a number of situations in which the United States has initiated defense programs that have caused interaction between a free use of the seas and self-defense.

Chapter II

Freedom of the Sea

A. Meaning

It is perhaps best to illustrate the meaning of the term "freedom of the seas" by considering the contemporary and least controversial norms peculiar to this principle. While considering these norms, there should be an awareness that all states, not merely those bordering on the sea, are concerned about the sea and how its use will affect their interest.[3] This awareness hopefully will make it easier to appreciate the exigency of maintaining a freedom of use in, on and above the oceans of the world.

(1) Those who make use of the sea, including the air above and the bed below, may do so for any reasonable purpose not expressly or impliedly prohibited by inter-

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national law,[4] for instance, sea and air navigation, fishing, laying of cables and naval maneuvers. The right to use the sea is thus tempered by reasonableness and the measure of reasonableness should be the effect of a given use or exclusion of use upon the common interest of the international community.

(2) Each member of the international community may exercise exclusive jurisdiction on the high seas over vessels it authorizes to sail under its protection; however, customary international law recognizes a number of exceptions: hot pursuit, i.e. if a ship of state A violates the laws of state B while within waters over which state B is recognized by the international community to exercise sovereign control, state B may pursue the vessel of state A beyond these territorial waters into the high sea if this is so necessary to apprehend the vessel and pursuit is uninterrupted. It should here be noted that while the doctrine of hot pursuit is generally accepted in international law, that area of the sea over which a state may exercise sovereign control

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is extremely unsettled;[5] any member of the international community may exercise jurisdiction over pirate vessels;[6] any nation may take jurisdiction over a collision case.[7]

(3) The right of innocent passage allows a merchant ship to pass through the territorial waters of another state if prudent navigation so dictates that such a course is the most desirable to reach a given destination.[8] There is, however, a controversy over the right of a warship to make innocent passage.[9]

(4) Vessels in distress have free access to any port in the international community. The mere fact that a vessel claiming distress reaches port under her own power does not deprive her of the right to hospitality, since a master cannot be expected to delay seeking shelter until his vessel is in danger of sinking. However, the actuality

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[5]See, Law of Naval Warfare, NWIP 10-2, para 412, n 4, (19) for a listing of the various limits of the territorial sea claimed by states in the international community.

[6]U.S. v. Klintock, 18 U.S. (5 Wheat.) 144 (1820).

[7]The Belgenland, 114 U.S. 355 (1885).

[8]Jessup, The Law of Territorial Waters and Maritime Jurisdiction 120, (1927).

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of the distress will be carefully scrutinized to prevent the working of fraud.[10]

(5) No state may exercise sovereignty over any portion of the surface of the high sea.[11] It should be noted that this principle was not perfected without controversy. Until the end of the 18th century the majority of Europe's littoral states pretended to exercise sovereignty over vast bodies of ocean[12] and presently the trend seems to be reverting to this position.[13]

In summary, the above mentioned norms seemingly evidence a contemporary community recognition that the oceans are susceptible to community use. However, despite the recognition of these benefits, the free uses of the sea are necessarily qualified, first, because freedom cannot

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[11]Colombos, International Law of the Sea 44, (5th ed. 1962).

[12]Id. at 45.

[13]Chile, Equador, Peru and El Salvador have extended their territorial sea outward two-hundred miles; the United States, historically a proponent of the three mile territorial sea, reluctantly proposed an extention of the territorial sea to six miles at the 1958 Geneva Convention on the Law of the Sea; Schwarzenberger, the Fundamental Principles of International Law, 1 Receuil des Cours, 366 (1955).

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B. Qualification of Free Use of the Oceans

1. Territorial Sea

The concept of the territorial sea seems to be the remnant of the principle of exclusive sovereniqty over the sea prevalent before and during the greater part of the 18th century.[14] The principal maritime powers of the later 18th century, led by Great Britain, recognized that the advances in spacial uses of the sea rendered the doctrine of absolute sovereignty detrimental to further progress in this direction and Grotius' Mare Liberum superceded Selden's Mare Clausum. However, states were not ready to wholly abandon the concept of sovereignty over those portions of the sea adjacent to the state. There is and was the lingering fear that loss of sovereignty over this area of the sea would be coincident to loss of economic rights, and the ability to defend against seaward agression. Innocent passage is the single exception that exclusive sovereignity has conceded to freedom of the seas.

[14]Op. cit. supra n. 8 at 44.

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The rapid technological advances in methods of economic exploitation of sea resources, nutritional and mineral, and sophisticated military offensive and defensive systems have apparently caused many states to press for an extension of the territorial sea,[15] rather than searching for adequate protection through methods that would cause minimum delimitation of the free use of the sea. Thus, it appears that unless such a trend is halted, the principle of freedom of the seas will regress rather than evolve.

2. The High Seas and The Contiguous Zone.

"As distinct from national waters and the territorial sea, the high seas are those parts of the interlinking chain of oceans which lie to the seaward of the territorial seas."[16] It is within the high sea and the air above the high sea that the principle of freedom of use is primarily applicable, innocent passage being the single exception of any import and this relevant only to the sea, not the air above the sea. The contiguous

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zone is an undefined area of the sea and air above the sea within the high sea.[17] In the contiguous zone, a state may exercise limited, reasonable, and, hopefully, temporary authority, despite an incidental delimination of the free use of the sea.

The United States has recognized the contiguous zone concept for more than one-hundred and fifty years. In the case of Church v. Hubbart,[18]Chief Justice Marshall held that a state had the right to exercise authority on the high sea if the exercise of such authority was reasonable. He equated reasonableness to acceptance by the other members of the international community of the uniliateral exericse of the particular authority. Marshall's test of acceptance raises the issue of the less powerful state having to accept the dictates of the more powerful state, in which case the "reasonableness" would be subject to question. If possible, the reasonableness of an exercise of authority would be better tested by an institution similar to the World Court,having jurisdiction over such matters or by treaty.

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[17]Article 24 of the 1960 Convention on the Law of the Sea does limit the contiguous zone by definition to 12 miles. This limitation is contrary to the concept of the contiguous zone and the current practice of the major maritime countries.

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The function of the contiguous zone should be "..... to serve as a safety valve from the rigidities of the territorial sea, permitting the satisfaction of particular reasonable demands through the exercise of limited authority..."[19] The contiguous zone concept should then allow realization of certain contemporary necessities of a state, defense, economic and sanitary, without the almost total impingement on free use of the sea permitted by the territorial sea concept. Thus, the contiguous zone concept is presently a way to afford the most equitable balance between exclusive and inclusive claims to the sea.[20] Even more importantly, the contiguous zone concept provides a possible escape from the trend towards extension of sovereignty on the oceans. There is no denying that the contemporary climate of the international community seems to require exercise of authority beyond territorial limits,[21] but hopefully man can obtain a more favorable climate and therefore it would be unwise to accept an extension of the

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[19] Op. cit. supra n. 2 at 76

[20] Inclusive claims would be those made by non-littoral and littoral states to keep the sea free of burdens to navigation, fishing, etc., while exclusive claimants demand complete control of certain portions of the sea necessary to protect their security, economic and/or military.

[21] Even Great Britain, historically antagonistic towards the contiguous zone concept, has shown signs of relenting, "Nearly a century has now passed since the unsatisfactory dispute with Spain (over the British Hovering Acts) was allowed to die out, and since then the government of Great Britain has shown an increasing reluctance to resist actively such claims by other states as can be justified on the principle of self-defense." Smith, The Law and Customs of the Sea, 21 (2d. ed. 1950).

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rigid territorial sea concept, thereby making it more difficult to retreat therefrom when retreat becomes feasible.

> "...[s]overeignty is not necessarily indivisible, and a comprehensive, continuing competence is easily distinguished from a particular, occasioned competence;... it should require little emphasis that states need not, and surely do not make claims to sovereignty over adjacent waters when they assert claims only to an occasional competence to proscribe for the protection of certain particular interests in specified contexts. The simple dichotomy, 'sovereignty' - 'no sovereignty,' is far from adequate to describe the complex distribution among states of inclusive and exclusive competences over the use of the oceans."[22]

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[2] Cit. at supra n. 2 at 910.

United Nations Convention on the Law of the Sea. This Convention was attended by representatives of most of the states in the world community.[23] The Convention considered the contiguous zone concept and adopted an Article[24] which reads as follows:

> (1) In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
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> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea:
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> (b) Punish infringement of the above regulations committed within its territory or territorial sea:
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> (2) The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.
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> (3) Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point on the baseline from which the breadth of the territorial seas of the two States is measured.

The conception of Article 24 can be traced to a 1956

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In summary, the principle of freedom of the sea should direct towards a freedom of use, with only functional limitations, through which all states may equitably share in the

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[25] International Law Commission, Report, U.N. General Assembly, Official Records, p. 39, 11th Session, Supp. No. 9 (U.N. Doc. No. A/3159); United Nations Conference on the Law of the Sea, Official Records, Vol. 2, p. 40 (U.N. Doc. No. A/Conf. 13) (1958).

[26] Op. cit. supra n. 2, at 604 "The Commission (International Law Commission) not only conceived its positive recommendation narrowly, but also undertook to identify interests it thought coastal states specifically should not be permitted to protect in the contiguous zone. The Commission thus specifically emphasized that 'security rights' were not included, offering as justification that 'the extreme vagueness of the term security' would open the way for abuses."

[27] In 1951 there were at least 18 states that claimed contiguous zones for security reasons. Boggs, National Claims in Adjacent Seas, 41 Geographical Rev. 185, 192-201 (1951).

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vast resources of the oceans. However, movement in this direction must be reasoned. The present day world climate cannot be ignored and it will force states to exercise deliminations upon free use in the name of self-defense, hopefully with a realization that the community must continue to move toward a goal that will make such action unnecessary in the future.

Chapter III

Self-Defense

A. Meaning

The right to practice self-defense is common to every major system of law,[28] however, its legal function, i.e., what rights may be defended and when they may defended will be dictated by the nature and development of the system of law in which it must operate.[29] In the international community, for instance, the absence of centralized international order could elevate the principle of self-defense to a right of the highest order while the acquisition of centralized authority would evidence a decline in the precedence of self-defense as centeral authority assumed responsibility for the protection of the

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[28]Jenks, The Common Law of Man 143 (1958).

[29]Bowett, Self-Defense in International Law 1, (1958); Op. cit. supra n. 16 at 342.

Chapter III

Self-Defense

A. Meaning

The right to practice self-defense is common to every major system of law,[24] however, its legal function, i.e., what rights may be defended and when they may be defended will be dictated by the nature and development of the system of law in which it must operate.[25] In the international community, for instance, the absence of centralized international order could elevate the principle of self-defense to a right of the highest order while the centralization of centralized authority would evidence a decline in the prominence of self-defense to control authority assumed responsibility for the protection of the

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[24]Bowles, The Common Law of Man 143 (1938).

[25]Bowett, Self-Defense in International Law 1, (1958); Op. cit. supra n. 16 at 5-12.

communities members.

"On the level of unorganized international society, the problem of self-defense is entangled intricately with that of the place of war in international law,"[30] since if states could legally resort to war at will, the function of self-defense would be minimal. Accordingly, a short consideration of the historic right to resort to war in international law will aid in understanding the evolution of the principle of self-defense.

The international community evidences a long history of struggle in its attempt to bring war within the law. Each formulation of a doctrine to distinguish just and unjust war has been ..."so elastic that state practice found little difficulty in justifying in terms of just war any type of war, be it preventive or down right aggressive."[31]

Short of war, there were forms of self-help and reprisal in those situations in which a state failed, under customary international law, to live up to its responsibilities. In these situations, a state could either submit to these limited forms of pressure[32] or resist by force. If

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[30] Op. cit. supra n. 16 at 327.

[31] Id. at 328; Hitler justified the German invasion of Poland in 1939 on the grounds of self-defense.

[32] For instance, pacific blockade, embargo, and naval demonstrations displaying a show of strength.

"On the level of unorganized international society, the problem of self-defense is entangled intricately with that of the place of war in international law,"[30] since if states could legally resort to war at will, the function of self-defense would be minimal. Accordingly, a short consideration of the historic right to resort to war in international law will aid in understanding the evolution of the principle of self-defense.

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[30] Op. cit. supra n. 16 at 317.

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it is assumed that reprisals were lawful, it must be conceded that resistance to their lawful appreciation would be illegal, however, in the unorganized society of international law, there existed no objective judge of their legality. "Thus, a state may treat them as illegal and apply counter-reprisals. Moreover, if a state contests the legality of such reprisals, it is always in a position to plead self-defense."[33]

The first "concrete" step toward the elimination of war was taken in 1928, in the Kellog-Briand Pact, in which the use of war as a national policy was declared to be illegal. The text of the Kellog-Briand Pact did not mention the principle of self-defense but the position of the United States as set forth by Mr. Kellog, then Secretary of State, made it obvious that a war in self-defense was justifiable.[34] Thus the principle of self-defense, which by circumstances had been confined in application to situations short of war,[35] was shifted to center stage in the world arena. It now became

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[33]Op. cit. supra n. 16 at 328.

[34]Mr. Kellog's note of June 23, 1928 stated that, "there is nothing in the American draft of the anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require resort to war in self-defense." (emphasis mine).

[35]So long as agressive war was justifiable under customary international law, the principle of self-defense was primarily considered only in exertions of force short of war.

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necessary to formulate just what customary international law meant by self-defense, since this principle alone would justify unilateral resort to war.

1. Self-Defense in Customary International Law

The precepts of self-defense eminating from the 1838 negotiations between the United States and Great Britain concerning an invasion of United States territorial integrity by the British,[36] are worthy of note, since they seem to have been adopted by international law to both justify and criticize use of force. It is to Daniel Webster, in his capacity as secretary of state for the United States, that the credit must be given for formulating those precepts in the following definition of when self-defense may be used: "A government alleging self-defense must show a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."[37] In addition to Webster's formula treating the question of when self-defense may be exerted, the Caroline and McLeod episode, out of which these

[36] The Caroline and McLeod Cases, II Moores Digest 409.

[37] Letter from the Secretary of State to the British Minister, 6 Works of Daniel Webster 306 (12th ed. 1860) (emphasis mine).

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negotions grew, treated of what rights a state might defend. The case stands for the proposition in customary international law that territorial integrity is "on one hand....a right which may be protected by the exercise of self-defense, and on the other it may be subject to the right of self-defense of other states."[38] This concept would equally apply to ships by applying the fiction that a ship represents the territory of its flag.

The obvious contextual difficulty with Mr. Webster's test is its subjectivity.[39] While it is true that given an organized judicial system the application of Mr. Webster's test would be as capable of judicial determination, as the reasonable man test,[40] in an unorganized international society, permitting each state to exert force based on its own subjective appraisal of necessity causes untold difficulty. The lack of an effective judicial organization to determine the legality of an exertion of force in self-defense renders the test less than perfect.

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[38]Op. cit. supra n. 29 at 31.

[39]Cf. McDougal and Feliciano, Law and Minium World Public Order, 217 (1958) which states that the language of Mr. Webster's test if read litterally, ..."is cast in language so abstractly restrictive as almost....to impose paralysis."

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The proposition in Caroline and McLeod that a state might go outside its territory into the territory of another for purposes of self-defense, made it relatively easy to support a contention that states could exert force in the high sea adjacent to their territory. If the sovereign territory of a state could be invaded in the name of self-defense, surely the high sea would be subject to the same condition.[41] Church v. Hubbard recognized the application of this principle to situations occurring on the high seas.[42]

The application of the principle of self-defense to situations arising on the high seas seems to have been sustained or justified on the basis of reciprocity. In an unorganized international society, the problems stimulating recourse to delimiting actions have been coincident to most, if not all, littoral states. "There is, however, no agreement on the precise nature of the circumstances which enable this protective jurisdiction to be exercised or on the forms of prevention of which a state may have recourse in the exercise of its right to self-defense."[43] Based on this admittedly vague principle, it has been the practice of states to exercise jurisdiction in waters adjacent to the territorial

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[41] Op. cit. supra n. 29 at 60.

[42] Op. cit. supra n. 19.

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sea for the protection of fishing, sanitation, customs, rights, and security.[44]

In the latter part of the 19th century the United States seized a number of unlicensed British Columbian sealing schooners operating outside United States territorial waters in the Behring Sea. The British protested the seizures and the United States and Britain agreed to submit the dispute to arbitration.[45] The United States counsel contended before the arbitrator that "the right of self-defense...is a perfect and paramount right to which all others are subordinate; that it extends to all material interests...important to be defended; that in time, place, the manner, and the extent of its execution, it is limited only by the actual necessity of the particular case;..."[46] The Tribunal of Arbitration found in favor of Britain, rejecting the above claim[47] as well as the United States contention that there was a property interest in the seals, the seals having come from United States territory.[48] Thus, the right of a state to protect is possible

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[44]Op. cit. supra. n. 8 at 105.

[45]Oppenheim, International Law 620 (8th ed. Lauterpacht 1955).

[46]Fur Seal Arbitration, 1 Int. Arb. 839-40 (1893).

[47]Cheng, General Principles of Law 94, (1953).

[48]Id. at 499.

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Again, self-defense has been the basis upon which states exercised authority in the waters adjacent to the territorial sea for the protection of customs, fiscal and sanitary regulations.[50] It was considered that the same basis existed for the protection of these interests as existed for the protection of territorial integrity, i.e., conditions of entry, even though perhaps in a lesser degree.[51]

Customary international law has long recognized state practice of exercising authority in waters adjacent to their territorial seas for the purpose of security.[52] Again, the justification seems to be reciprocity.

In 1873, a ship of American registry, the Virginius, was apprehended by a Spanish warship on the high seas while in the vicinity of Cuba, at that time a Spanish possession.

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[49]British counsel in the Fur Seal Arbitration made a statement to the effect that if the purpose of the British fishermen was not to exercise their own rights but to maliciously interfere with the rights of the United States, such action would be improper and the President of the Tribunal concurred; Op. cit. supra, n. 8 at 121-22.

[50]Op. cit. supra, n. 8 at 105.

[51]Op. cit. supra, n. 29 at 67.

[52]Op. cit. supra, n. 8 at 96.

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The Spanish claimed that the vessal was fictiously registered and carrying arms to Cuban insurgents. The Spanish, on this basis, considered the act piracy and executed the crew which included American and British subjects.[53] The United States and Britain protested the executions but not the seizure of the ships,[54] apparently considering the principle of self-defense as justification for the seizure,[55]and, at the same time, as a prohibition to the executions. Thus, it is seen that while self-defense may be proper in a given instance, the application of excessive force might alter the role of the defender to that of the agressor.

In summary, the examples are many for the proposition that international customary law recognized the right of a state to exercise force in defense of its rights even at the expense of the rights of others in situations concerned with the high seas.[56] It is even possible to formulate a

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[55]Fur Seal Arbitration; Japanese invasion of Manchuria in 1931; German invasion of Norway; Church v. Hubbard; Virginus; Caroline; Custom and fiscal regulations.

[56]Op. cit. supra. n.29 at 11.

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[56] Op. cit. supra. n.39 at II.

a definition of self-defense in customary international law.

Self-defense might be said to be the privilege of a state to lawfully exert force against another state or against individuals to a degree necessary to protect its vital interests, military and/or economic, from illegal acts or omissions. Self-defense does not include: (1) Self-help, which, though similarly dependent upon a prior illegal act,[57] does not function to preserve the status quo but rather effects reprisals to enforce an international duty that would attach to the perpetrator of the illegal act; (2) Necessity and/or self-preservation which stand for a mere recognition that ability to abide by law is limited and therefore the failure to do so in given circumstances will excuse the illegal act or omission.[58]

The first difficulty with this definition is the inability of an unorganized international society to objectively determine the categories of illegal acts or omissions. Subsequently, each state uses a subjective criterion based upon its vital interest as it sees them. The inevitable result is the equation of self-defense to self-help, necessity, or self-preservation.

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[57] Op. cit. supra, n. 16, at 342.

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The second difficulty arises in deciding when, assuming there is an agreed upon right that may be defended by force, a state may resort to force.

It is fitting to end this very brief discussion of self-defense in customary international law with the observation made by John Bassett Moore that "...the attempt to so define self-defense that its future application would be clear and practically automatic is just as futile as the attempt to define agression has been...."[59]

2. Self-Defense Subsequent to World War II

Consideration of the principle of self-defense subsequent to world war II is in affect a consideration of the United Nations Charter, man's best effort to date in his desire to establish order under law. Any consideration of the Charter profits by first examining the purposes of the organization as set forth in its preamble and first article. The preamble states,

> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and

[59]The Collected Papers of John Bassett Moore 448 (Vol. 6 1944).

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worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS
to practice tolerance and live together in peace with on another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples.

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS
Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

Article I states the purposes of the United Nations Organizations, and they are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by

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to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,

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Article 1 states the purposes of the United Nations Organizations, and they are:

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peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

This introduction to the United Nations Charter, as might be expected, gives a clearer picture of where the international community has been and where it hopes to go rather than the particulars of how it plans to get there. The particulars of the plan are set forth in the body of the Charter and like all particulars, are most relevant when considered in context. Thus, it might be argued that unless the purposes and goals of the preamble and first article, or in other words, the materials that determine the contextual reference of the Charter, are continually in mind when examining any given subsequent article, the likelyhood of the misinterpre-

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tation of the article is greatly enhanced.

It was noted earlier that the Kellog-Briand Pact prohibited signatory states from using war as a tool of national policy. Article II, section 4 of the United Nations Charter strengthed and added to that prohibition. The Article states,

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> 4. All Members shall refrain in their international relations from the threat or use of force against territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.

Thus the threat of force was included in the prohibition and use of the word "war," which had created problems[60] in the Kellog-Briand Pact, was excluded. This change of approach to the problem of control of war through law is not surprising when considered in context. As the Preamble of the United Nations Charter states, "We the People of the United Nations determined to save succeeding generations from the scourge of war, which twise in our life time has brought untold sorrow to mankind ....," the second war not only more destructive than

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A consideration of Article 2, section 4 in conjunction with the purposes of the United Nations, can arguably result in a conclusion that the Article proscribed even the use or threat of force in self-defense. While all would agree that self-defense was a basic principle, few would argue with its history of abuse and hence the selection of the greater good might arguably justify the elmination of the principle in the interest of world peace. Either this or some other unknown factor caused the delegates at San Francisco to press for and finally adopt an Article defining the right of a state to exert force in self-defense either collectively or individually.

There are those who maintain that no additional article was necessary because, under their interpretation of Article 2, section 4 and the purposes of the United Nations, the principle of self-defense as recognized by customary international law was in no way limited by Article 2.[61] It can be assumed that a number of delegates in San Francisco did not share this

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view because their fears were sufficient to cause the adoption of Article 51 which reads as follows:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

The language of Article 51 evidences an obvious recognition of an existing, inherent right of self-defense. Does it attempt to redefine the uses of this inherent right? There can be little argument that it does attempt to redefine the use of the right of self-defense. The Article requires a member using force in self-defense to report such use to the United Nations Security Council and to permit the Council "...to take at any time such action as it deems necessary in order to maintain or restore international peace and security." Such was not the case in customary international law where a state could continue to exert force until the danger was removed.

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This is no little sacrifice. The state was now required to submit to the will of the United Nations in combating what it considered to be a danger to itself. The above example negates the argument that Article 51 merely restates the customary international legal rights of a nation to act in its defense.

The reason for this limitation is clear. If the United Nations was to fulfil its stated purposes it could hardly allow its members or non-members to continue an initial exertion of force uncontroled. Accordingly, the right to resort to unilaterial or collective self-defense was reduced to an interim measure. If this limitation is so obvious, it does not appear unreasonable to examine the language for additional limitations, particularly in face of the logic, that control of the initial right to exert force would assist in effectuating the purposes of the United Nations more so than control of the force subsequent to its initial exertion. An examination of the language of the Article in this context causes the examiner to pause in the very first sentence, "Nothing...shall impair the...right....of self-defense <u>if an armed attack occurs</u> against a member..." Is it unreasonable

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to assume that this language was originally meant to prohibit a state, individually or collectively, from resorting to the use of force until it suffered an armed attack? To exclude this possibility on the sole basis that the contemporary state of world affairs so dictates, would seem to ignore the context in which the Article was drafted,as well as the stated purposes of the United Nations. This argument is not meant to imply that contemporary considerations of self-defense should ignore the present state of affairs, but that perhaps contemporary considerations of self-defense, rather than attempting to justify individual or collective right to resort to use of force in self-defense on a unrealistic interpretation of what Article 51 meant when it was drafted, admit that Article 51 and the United Nations failed to present the hoped for framework within which the use of force could be controled. This admission would perhaps clear the air and allow the search to continue for a suitable framework within which the exertion of force will be subsumed to law.

Chapter III

Contemporary Self-Defense Measures Affecting the Free Use of the Sea

The concept of self-defense is not limited in coverage to those situations concerning nuclear attack or similar extreme situations.[62] Article 2 section 4 of the United Nations Charter does not include the term "war" and as previously stated, the juridical difficulties coincident with its use have been avoided, however, the positive benefit derived from the exclusion of the term is the broadening of control to include situations that may escalate as well as those that are extremely dangerous per se. The foresight here present, whether actual or imagined, has been beneficial. It is not the threat of nuclear war or armed invasion that daily confronts the decision makers but the lesser and more subtle exertions of force and threats to do so. Therefore, the proposition that all acts of states interfereing with the free use of the sea must look to the Charter for justification is valid, particularly those situations which may depend on force for their implementation.

There are at least three areas in which the principle

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The evolution of world politics since the termination of World War II and the staggering technological advances in both exploitation of sea resources and methods of destruction, have prompted the United States to employ certain measures or devices which it considers necessary to protect national and hemispheric interests, military and economic. Some of these measures or devices interfere in varying degrees with

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the rights of others to use the sea and the air above the sea, and therefore, must be examined as to degree of interference and implementing force required for their maintance if a proper analysis is to be made as to their reasonableness and hence acceptability in international law.[63]

The United States, on a number of occasions, has for all intents and purposes closed off vast reaches of the Pacific Ocean to conduct nuclear weapons tests.[64] On first consideration this degree of interference would appear unreasonable if for no other reason than the scope of the area involved, however, an examination of the attending facts reduces the unpalatability and uncovers evidence upon which an argument of reasonable use might be bottomed.

There is no inconsistency per se in maintaining that a nation may not exercise "sovereignty" over any portion of the high sea and simultaneously attempting to justify the position of the United States as concerns the Pacific nuclear

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The simplest justification of this use would be the remoteness of the area of ocean in which the nuclear weapons were tested. This area was removed from any major shipping lanes or major fishing grounds[67] thus the United States, while cognizant of its right to use the sea, evidenced a consideration of rights of others to do likewise.[68] Additionally, the

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[65] Op. cit. supra n. 63 at 663.

[66] See text at n. 22.

[67] Op. cit. supra. n. 63 at 682-683.

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United States may further support the reasonableness of this use with the claim of necessity in the interest of self-defense and scientific progress. The tests were surely not mere arbitrary usings of a resource for the purpose of exercising a right, but a purposeful and beneficial use.

The remoteness of the area chosen for nuclear weapons testing minimizes the aspect of an implementing force to keep the area free of commerical sea and air traffic, however, it does not remove the necessity for a consideration of this subject. If it is assumed that the use of a particular area of the ocean is reasonable and further that the nature of the use will permit of only a single user at a given time, has anyone the right to interfere with the user? In the context of this problem the answer would be no, but the more important issue is by what means interference can be prevented and by whom. Unfortunately there is no acceptable contemporary solution if the solution is sought within the framework of effective control of unilateral exertion of force by international law, as it must be if force is to be effectively controled. A state might subscribe to this view but at the same time it must be cognizant of the fact that an interim method of enforcement is necessitated in cer-

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tain situations. This interim method might be labeled "administrative police power" and would hopefully be used sparingly and without force of arms where possible. Without such an interim measure the interaction of states takes on a dtopean aspect.

The United States has constructed radar towers outside the territorial waters to provide warning of the approach of unidentified aircraft. The towers are removed from commercial areas and use no more space than a modern merchant ship at anchor. As discussed above, the United States has a right to use the ocean and incidental reasonable interference resulting therefrom is an accepted requisite of use. The interference with the free use of the sea attributable to the radar towers is diminimus and few would argue as to its reasonableness, whether on the basis of self-defense or air navigation safety. However, there remains the problem of protection of the reasonable use against interference and in this regard, the radar towers are analogous to the nuclear weapon tests. Neither situation would permit the use of military force to prevent interference in the absence of armed attack and each is of a nature that allows the use

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of lesser, or administrative force, to prevent interference. The air defense warning systems employed by the United States are also justifiable on the same basis plus the additional justification of a condition of entry since the United States requires identification for only inbound aircraft.

In October 1962 the United States ascertained that the Republic of Cuba had agreed to allow the Soviet Union to set up operational medium range missiles with nuclear capability in Cuba. The government of the United States considered this agreement so dangerous to western hemispheric security that it took action to prevent its implementation. The action of the United States included a naval blockade of Cuba which was designed to prevent the importation of missiles. The warships employed in the blockade were ordered to halt any ship capable of carrying a missile, search it, and prevent it from entering Cuba if it carried missiles. Assuming, without deciding, that the implementation of the Soviet-Cuban agreement would constitute a threat of force in violation of Article 2, section 4 of the United Nations Charter, was the method employed by the United States permitted by international law?

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In the nuclear testing situation discussed above, the United States was making reasonable use of the sea and any question of force involved a protection of that right to use the sea. In the Cuban Blockade, the United States was not attempting to protect its right to make reasonable use of the sea but was restricting through the use of force, the right of others to use the sea in order to protect yet another right, i.e., territorial integrity.

The application of force to prevent a completely free use of the sea is not contrary per se to the principle of freedom of the sea, i.e., the enforcement of custom or sanitary regulations. However, it is here that some limitation of "administrative police powers" must be established in order to avoid an application of excessive force. The nature and purpose of administrative enforcement precludes the employment of military machinery to accomplish its ends.[69] It can therefore be concluded that a blockade of Cuba by United States warships was not within the category of administrative police powers but obviously in the category of self-defense involving a military committment. Thus, while unilateral

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The defense of rights that may affect the use of the sea is not confined to matters pertaining to military security. In 1945, the United States proclaimed that the natural resources of the sub-soil and sea-bed of its continental shelf[70] were subject to its jurisdiction and control.[71] This continental shelf concept was readily accepted in the international community as is evidenced by results of the 1958 Convention on the Continental Shelf,[72] Article 2 of which states in part,

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1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

Therefore, unlike the weapon testing in the Pacific discussed above, there is here less need to justify the use of the sea prior to attacking the problem of defending that right should others interfere with its exercise. However, in the area of defense of the established right they appear to warrant identical solution, each being of a nature that would permit the use of "force," i.e., administrative force which is distinguishable from the concept of "force" as it is used in Article 2 of the United Nations Charter.

To summarize, the principle of self-defense was limited by Article 51 of the United Nations Charter in 1945 in hopes that the limitation would aid in the overall purpose of the Charter to bring the use of force effectively within the rule of international law. The force or coercion at which the Charter was directed was that type of force or coercion which by its very nature either resulted in clash of arms or was very likely to escalate to such a state. Coercions of a relatively low level of intensity and magnitude, those which are of an administrative nature and unescapable

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in an international community of states interacting and competing and which are directed, not against an individual state but against all states, were not meant to be included within the prohibition for to do so would impede international relations to such an extent as to render them unworkable.[73]

Chapter IV

Conclusion's

Which of these two principles of international law is most important and in what framwork will the term "important" be defined? The framework must be the mutual benefit of the international community. If the principle of self-defense is minimized will there be a true community left to enjoy the benefits, present and predicted, of the sea? It is obviously asking too much of a state to totally forego the right to use force in self-defense but this is neither proposed or necessary. There is a middle ground on which states might accept limitations upon its right to exert force in self-defense in turn for safeguards that minimize the risk of doing so. However, before any such system can be realized there must be a willingness on the part of states to reexamine the archaic "feelings" about nationalism with

[73]Op. cit. supra. n. 62 at 212-13.

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[73] Op. cit. supra. n. 62 at 312-13.

a view towards replacing them with contemporary "thoughts" about nationalism. The quantum gains in technology shrink the world daily and nations must learn to cooperate if there is to be long term mutual benefit rather than short term nationalistic benefit.

Within the framework of mutual benefit to the international community, the principle of freedom of the sea should progress while the principle of self-defense should decline in proportion to the growth of effective control of force through law. For this reason the principle of freedom of the sea might be considered superior to the principle of self-defense, however, the contemporary world scene dictates that the former be subsumed to the latter until there is effective international control of force through law.

It is difficult to disagree with the purpose of the United Nations but it is more difficult to disagree with the proposition that the mechanics through which these purposes hoped to be realized have failed. The greatest failure has unfortunately been in the area which offered the only real solution to control of force through peace, The International Court of Justice. All members of the United Nations are members of the Court, however, submission to its jurisdiction

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is voluntary and even then it may be conditional.[74]

If the machinery for effective control of force through law has failed to function as planned, can the law, in this case the limitation of the principle of self-defense by Article 51 of the United Nations Charter, be ignored? One author answers the question as follows:

> ...the rule of the Charter against unilateral force in international relations is the essence of any meaningful concept of law between nations, and the foundation on which rest all other attempts to regulate international behavior... I see nothing in present international society - in the cold war, in terrible weapons, in new nations, in the consequent changes in the United Nations - to suggest that it is desirable or necessary to modify or relax that law. Indeed, the new weapons and the new terrors of war, yet undreamed of when the Charter was written, render it even more important that law should exert its every influence to deternations from initiating any force which might expand and escalate into total destruction. The interests of nations, their wants of security and welfare, even their quests for justice and human rights, must be pursued by many other means, but not by unilateral force.[75]

Others maintain that states must revert to customary international law in the face of the failure of the United Nations

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[74]All members of the United Nations are members of the Internationsl Court but membership is not synonomous with submission to its jurisdiction. Submission to the Courts jurisdiction is on a voluntary basis and even then can be conditional. As of 1961 only 39 nations had volutarily submitted to jurisdiction and these submissions included a myread of conditions. Larson, When Nation Disagree 73, (1961).

[75]Henkin, Proceedings of the American Society of International Law 153, (1963).

is voluntary and even then it may be conditional.[74]

If the machinery for effective control of force through law has failed to function as planned, can the law, in this case the limitation of the principle of self-defense by Article 51 of the United Nations Charter, be ignored? One author answers the question as follows:

> ...the rule of the Charter against unilateral force in international relations is the essence of any meaningful concept of law between nations, and the foundation on which rest all other attempts to regulate international behavior... I see nothing in present international society - in the cold war, in terrible weapons, in new nations, in the consequent changes in the United Nations - to suggest that it is desirable or necessary to modify or relax that law. Indeed, the new weapons and the new horrors of war, yet undreamed of when the Charter was written, render it even more important that law should exert its every influence to deterrations from initiating any force which might expand and degenerate into total destruction. The interests of nations, their wants of security and welfare, even their quests for justice and human rights, must be pursued by many other means, but not by unilateral force.[75]

Dinstein maintains that states must revert to customary international law in the face of the failure of the United Nations

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[74]All members of the United Nations are members of the International Court but membership is not synonomous with submission to its jurisdiction. Submission to the Courts jurisdiction is on a voluntary basis and even then can be conditional. As of 1961 only 39 nations had voluntarily submitted to jurisdiction and these submissions included a myriad of conditions. Larson, When Nation Disagree 73, (1961).

[75]Stein, Proceedings of the American Society of International Law 153, (1963).

to effectively control force.

Of the first position it must be asked by which ..."many other means"...may the affective security interest of a nation be pursued, for example, in the Cuban blockage. What were the alternatives? Non. Was the interference with the free use of the sea through force illegal in international law? Yes, the law has not been repealed merely because the enforcement machinery has failed to function. The maximum, rebus sec stantibus[76] is unhelpful if an affective legal order is hoped to be achieved.

The United States, with her great military and economic power, has a hegemonious responsibility to move the international community towards the goal of affective legal control of force but this responsibility also includes a duty to assure that international community arrives in one piece thus there will be times when it considers the use of a minimal amount of force, unilaterally applied, necessary if the overall goal is to be obtained. There are obvious imperfections in such a course of action but in an imperfect world these are to be expected and should not be justified

[76]If the basis upon which an international agreement was made no longer exist or have radically altered, the agreement no longer binds.

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The principle of a free sea embodies the foundation of a community interest that cannot be ignored. "We need to build a world community of interests before we can establish a world regime under law."[77] Only the sea of all man's resources has proved susceptible of communal use and hopefully the sea will give birth to the "community of interest" necessary for existence under law as it gave birth to man himself.

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[77]Patterson, Men and Ideas of the Law 414, (1953).

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[77] Patterson, Men and Ideas of the Law 414, (1953).

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